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No. 673

In the Supreme Court of the United States

OCTOBER TERM, 1946

CARTER H. HARRISON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

GREYVAN LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals (R. 254–259) is reported at 156 F. 2d 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1946 (R. 259). On September 19, 1946, a Justice of this Court entered an order enlarging the time within which to file a petition for certiorari for a period of 60 days from October 12, 1946, or until December 11, 1946 (R. 259). The petition for a writ of certiorari

was filed on November 6, 1946, and granted December 16, 1946 (R. 260). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether truckmen who furnished their services and their own trucks in hauling goods under written contracts with the taxpayer and the helpers of such truckmen were performing services as employees of taxpayer within the provisions of Sections 811 (b) and 9 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

2. Whether the court erred in holding that the Commissioner's determination of the amounts of taxable wages was arbitrary, the amounts of taxable wages having been determined under an agreement between taxpayer and the Collector of Internal Revenue and taxpayer having offered no evidence to show that the determination was erroneous.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 50–56.

STATEMENT

Respondent brought these actions for the refund of taxes levied and collected under Titles VIII and IX of the Social Security Act and sub-

chapters A and C of Chapter 9 of the Internal Revenue Code, for the years 1937 to 1942, inclusive, in the total amount of $32,226.19, plus interest. Except for a few relatively minor matters the facts shown by the evidence are not in dispute.[1]

Respondent, an Indiana corporation, is a common carrier operating over irregular routes in transporting household and other goods in 38 states and certain Canadian provinces (R. 219). It is authorized to conduct its business under the grandfather clause of the Motor Carrier Act of Congress and applicable acts and regulations of the several states, being certificated by the Interstate Commerce Commission and the regulatory

[1] The findings (R. 219–227) are in the main not inaccurate insofar as they recite facts as distinct from conclusions. But they omit almost all of the undisputed and mainly documentary facts which lead to a conclusion different from that reached by the district court, and give no real picture of how respondent's business is carried on. Inasmuch as these facts are largely documentary and undisputed, the failure to find them was "clearly erroneous" and this Court is not bound by the incomplete findings. *Sun Insurance Office, Ltd.* v. *Be-Mac Transport Co.*, 132 F. 2d 535 (C. C. A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (C. C. A. 7); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C. C. A. 8); *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704 (C. C. A. 3); *State Farm Mutual Auto Insurance Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8). See brief for the United States in *United States* v. *Silk*, No. 312, pp. 58–60. This statement is accordingly based upon the facts. To the extent permissible within the limits of a brief it attempts to give a complete picture.

authorities of the various states (R. 219). It files its tariff charges with the Interstate Commerce Commission (R. 219).

The Contract.—Respondent made written contracts with a number of motor vehicle equipment owners hereinafter referred to as "truckmen". The pertinent provisions of these contracts (R. 265–275) may be summarized as follows:[2]

The truckman was to "furnish to the Company for its exclusive service" the truck and equipment required in the transportation business. The truck was required to be painted with colors designated by the respondent and repainted whenever the latter deemed it necessary. (R. 265.). Paragraph 2 provided (R. 265–266):

> The Truckman will devote said motor-truck or trucks *exclusively to the services of the Company in its transportation* of goods, wares, and merchandise, loading and unloading the same and delivering to destination in accordance with the shipping contracts or bills entered into by the Company with its consignors or consignees; and in *connection therewith comply with all the rules and regulations and instructions of the Company.*[3]

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[2] The provisions of the contract are summarized in the opinion of the circuit court of appeals (R. 255–256). It was stipulated that the sample contract (R. 265–275) introduced in evidence as Exhibit A is identical in form with all the other contracts involved (R. 121–122).

[3] All italics in this brief are supplied. Respondent's counsel stated that under such a contract "you have a right to give

The truckman was to hire any labor required incident to picking up, loading, and delivering shipments "at his own expense and in his own employ and which shall be under his direction and control." (R. 266.)

Paragraph 5 provided that (R. 266):

> The Truckman will *personally drive* his motortruck or trucks exclusively, unless unforeseen circumstances require his employment of a substitute driver, of which the Company shall be notified and give its approval; provided, however, that the Truckman may permit a competent helper to act as a relief driver, so long as *such Truckman or such substitute driver remains personally on said motortruck* or trucks.[4]

The truckman was required to load, unload, place on delivery, set up and take apart for shipping purposes all furniture and other goods "in accordance with the tariffs, rules and regulations of the Company" (R. 266). The truckman was to furnish liability and property damage insurance (R. 266) "in such limits *as may in the opinion of the Company* be considered necessary for the protection of the interests concerned", and

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such instructions as you care to. The agreement was to abide by any rules and instructions that the company might give them" (R. 182).

[4] This provision was enforced by the Company so as to prevent a truckman whose father had died from letting the helper drive the truck back empty to Chicago (R. 187).

"fire, theft, collision, and other insurance *which the Company may specify* upon his motortruck or trucks at his own expense whenever, *in the opinion of the Company,* such insurance is necessary for its protection, and name the Company as an additional assured as its interests may appear" (R. 267). The Company was authorized to take out such insurance "jointly cover[ing] the liability of the Company and the Truckman" (R. 267) and charge it to the truckman's account. Respondent was to furnish cargo insurance on the goods transported (R. 266–267). Each truckman was required to post a fidelity bond of $1,000 covering himself and substitute driver, if any, and post a cash deposit of $250 with the Company pending final settlement of accounts (R. 267).

The truckman was to bear all operating costs such as property taxes, resident vehicle license fees, fuel, tires and repairs, while the respondent was to bear the costs of permits and licenses for operations in its service under federal or state law (R. 268–269).[5] The Company was authorized to "charge to the truckman's account" the cost of all damage or other claims (R. 268), which implied that the Company would bear the loss in the first instance. The truckman was to maintain the trucks in good condition at his own expense (R. 268). The truckman was not permitted to haul for other companies (R. 270). The truckman

[5] The truckman bore the cost of the license in the state of his residence (R. 269).

was to receive as remuneration a percentage of the predetermined tariff charges ranging from 50% to 52%, plus a bonus up to three percent of the tariff charges for satisfactory personal appearances, mental attitude and good mechanical condition of his truck (R. 270–273).

All contracts and bills of lading for the hauling of goods were required to be between respondent and the shipper or consignor (R. 270). The truckman was "to collect all moneys due the Company" in accordance with the Company's "instructions" (R. 268). The employment contract was subject to cancellation at any time upon written notice by either the truckman or the respondent (R. 271). The contract form was in use prior to the Social Security Act, and provisions of the contract were adhered to by the parties (R. 226).

The Union Agreement.—The respondent operated under a union contract (R. 368–371), covering "only such members of the Union * * * that own and operate their own equipment" (R. 369), with the Van Drivers', Chauffeurs, Piano, Furniture Movers, Packers and Helpers Union, Local #711, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America. The contract provided that the parties "subscribe to the provisions of and definitions concerning unfair labor practices set forth in the Wagner National Labor Relations Act." It also

provided that any truckman "must first become a member of the Union in good standing" before the respondent will enter into a contract of employment with him; that the Union may "reject the application of any person who, in its opinion, is not qualified to become a member of the Union," and that the Company would deduct Union dues and remit them to the Union (R. 370). A grievance board of Union and Company representatives was established to adjust all grievances. There was to be no "strike or walk-out while the Grievance Board referred to herein shall be considering a matter referred to it for decision, providing such Grievance Board acts within thirty (30) days" (R. 370). It was further provided that the truckmen would be required to hire Union helpers and drivers when available and to pay Union wages (R. 370). The contract stated "It is understood that such helpers or drivers are not the employees of the Company, but will be hired and paid by the Truckman and subject to his direction and control" (R. 370). The compensation paid to the truckmen was determined under a schedule of rates established between the respondent and the Union (R. 371). The agreement was subsequently amended to prescribe wages "When the Company hires Drivers to Drive Company Owned Trucks" (R. 374).

Holding out to the public.—The operation of the vans was held out to the public as a Company

undertaking. The Company required the vans to bear its name and to be painted with its colors (R. 265, 106). The photographic exhibits (opposite R. 374, 368) shows that only the Company's insignia appeared on the vans. (See also R. 188.) The Company operates through drivers admittedly its employees (R. 139, 161) a number of its own vans which are indistinguishable in appearance from the vans owned by the drivers (R. 110, 158). The shipper was not advised who owned the equipment (R. 190).

All papers received in relation to shipments were made out in the Company's name (R. 110). The Company's Shipping Order (plaintiffs' Exhibit C, opposite R. 275) advised customers that "the word company [is] understood throughout this contract as meaning any person or corporation in possession of the property under the contract". The Company advertised that (Exhibit 3, opposite R. 368) "modern vans, trained personnel and fine equipment are combined by Greyvan to provide you with perfect moving service."

Method of operation.—Before commencing upon his duties with the Company the truckman was required to attend a school in which he was taught how to handle his part of the paper work details of the Company's business and the mechanical and public relations problems arising in the course of his duties (R. 97, 181–192). It was necessary for the truckman to take this course

even though he had 12 years prior experience in the trucking business (R. 105–106). These instructions were supplemented with practical knowledge gained from traveling on the vans as a student (R. 96–97).

Respondent's chief dispatcher, upon receiving information as to contracts of shipment, assigned and gave instructions as to the hauling of goods to the truckmen here involved, as well as to other truckmen driving company-owned trucks, without distinction, depending on which were available (R. 145–146).[6] When a load was delivered the driver phoned or wired the dispatcher or reported to a branch office if there was one in that locality. The dispatcher then gave him further orders (R. 146). Loading directions were prepared in the dispatcher's office and issued in writing to the truckman (R. 146, Exhibit B, opposite p. 275). Shipments were handled in the same manner whether hauled by a truckman or by a driver operating a company-owned truck (R. 145). No load could be picked up by a truckman until such time as permission was given him by an official of the Company (R. 152), even though the load might represent business solicited and developed by the truckman (R. 109, 156). If a truck broke down, the Company was immediately notified, and if necessary, sent another truck (R. 149). The

[6] The drivers of company-owned equipment are concededly respondent's employees and not involved in this action (R. 222).

truckman was not directed as to the route to be taken.[1] (R. 103.)

The truckman paid all his expenses, bridge tolls, and fines but was allowed advances by the Company (R. 124). Although the truckman paid for his supplies and equipment, it was bought through the Company to get discounts (R. 100). Gasoline was procured through credit cards made out to the Company (R. 100, 108), but subsequently charged by the Company to the truckman's account. Insurance was carried under a blanket or fleet policy taken out by the Company (R. 101, 168), but charged to the truckman's account. Truckmen were instructed whether to extend credit or collect C. O. D. (R. 98). Amounts collected were to be remitted to the Company as soon as possible (R. 98–99). Truckmen were paid by the Company for some of their deadhead mileage (R. 150, 272–273). The account of each truckman was settled with the Company monthly (R. 100). The truckmen made considerably more than Company drivers not owning their trucks; estimates of the truckmen's income range from $250 to $500 per month net. (R. 102, 127, 177). The truckman's investment in truck, trailer and equipment, was approximately $5,000 (R. 116,

[1] When the shortest route to a destination passed through Kentucky, where the vans were too large to meet the state's maximum requirements and fines and delays might be incurred, the Company advised an alternative route "through suggestion" (R. 152, 187).

225). Some of the truckmen operate more than one truck (R. 167).

Small damage claims were settled by the truckman in cash on the spot; otherwise damage claims were reported to and settled by the Company, and charged to the truckman's account (R. 99–100). The truckmen hired and paid their own helpers for loading and unloading, using Union help when available (R. 99, 111, 116, 135).

The truckmen are "given to understand" that it "was the custom for all the boys" to purchase standard Company uniforms (R. 185), although they were not acually required to do so (R. 103, 111–112, 170–171, 179).

A Company official testified that truckmen had the right to refuse to accept loads assigned to them "though contract truckmen do not, as a common thing, refuse to handle shipments when they are issued instructions on those orders" (R. 146), that the company determined "whether the reason for the refusal was good or not" (R. 151, 146–147), and if not that the Company could terminate the contract (R. 147). A former owner-driver testified that he had no such right to refuse loads, and that he only refused a load when he intended to quit (R. 191–192).[8] We do not regard this testimony as conflicting, inasmuch as read as a whole it clearly means that the driver had the same right as any employee to refuse to do work which he was ordered to perform, but

[8] The trial court made no finding as to this point.

that he was subject to dismissal if the Company thought his refusal unreasonable.

The "Manual for Truckmen".—Beginning in 1940, respondent issued to each truckman a "Manual for Truckmen" containing numerous instructions and directions (R. 140–141). Prior thereto bulletins were issued (R. 140–141). Each truckman in the service or who entered the service after the Manual was issued received a copy of the Manual (R. 141).

A Company official testified that the Manual was "impractical and was not adhered to", but admitted that the truckmen were "never notified * * * that they were not obliged to follow the Manual" (R. 171). A former driver-owner testified that he had read the Manual when he started work, that he carried it with him in his truck but half the time didn't know where it was, and that he used his own judgment as to whether to follow the rules therein specified (R. 104).[9] Another former driver-owner testified that he was handed the Manual but not otherwise told about it, and that he interpreted it "to be an instruction of the company to follow" (R. 185–186).[10]

[9] The Company offered to produce five other witnesses who would offer cumulative testimony. The court indicated that it did not wish to hear such testimony but that the record should show the Company's offer (R. 120–121).

[10] Although the trial court was of a contrary view (R. 186), we think a worker's interpretation of the effect of a book of instructions is relevant apart from what the employer told him about it.

It is almost impossible within the confines of a brief to indicate the manner in which the Manual purported to control the minute details of a truckman's work. The Court is respectfully referred to it in its entirety (R. 276–368). Some pertinent passages will be quoted or summarized here.

The Manual opened with the following Introduction (R. 276-277):

> The purpose of this manual is to give the truckmen of Greyvan Lines a clear and concise picture of the proper methods to follow in their operations. The manual will, of course, fail in its purpose if truckmen do not read it thoroughly, refer to it frequently, and follow all instructions diligently.
>
> No rule or regulation has been included which, to our knowledge, is not to the best interests of the Company and entirely reasonable.

The Manual was divided into sections with appropriate headings for the various subjects to which the rules related. Section 1[11] entitled "General Rules" (R. 281–285) begins as follows:

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[11] A preface to Section 1 (R. 280–281) entitled "Loyalty" contains the following:

"If you work for a man, in Heaven's name work for him. If he pays you earnings that supply your bread and butter, work for him—speak well of him—think well of him—stand by him and stand by the institution he represents.

"I think if I worked for a man I would work for him. I would not work for him a part of the time and the rest of

The following pages contain General Rules of the Company and should be read very carefully and at frequent intervals. No criticism will befall a truckman who follows these rules and regulations carefully.

General Rules

1. Duties.—Truckmen's duties are prescribed by the rules herein contained and such additional orders as may be hereafter issued by the General Office. If in doubt as to the meaning of any rule, the driver should immediately apply to the nearest office for explanation. Ignorance of the law or of any rule of the Company will not be accepted as an excuse.

2. Manual Changes.—This book contains the fundamental rules. When changes in the instructions outlined in this manual are necessary, they will be issued by the General Office to all drivers. The changes will be accompanied by instructions as to where they are to be placed in the manual.

3. General Letters.—Special conditions require bulletins and general letters to be issued from time to time. These will be

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the time against him. I would give an undivided service or none. If put to the pinch, an ounce of loyalty is worth a pound of cleverness.

* * * * *

"Don't worry yourself and other Truckmen or employees with your problems and difficulties—take them up fairly and frankly with the department heads in the General Office. You will receive every courtesy and consideration."

issued by the various departments of the General Office to each truckman:

* * * * *

The "General Rules" continue (R. 282):

5. Conflict Between Laws and Rules.—No rule will be promulgated that is in conflict with law, but in some instances rules may be more strict than the legal requirements and truckmen must therefore, be familiar both with the laws governing the operation of their vehicles as well as the rules of the company on the same subject.

6. Truckmen's Responsibility.—The truckman is held responsible for:

A. The strict observance of all rules and instructions that may be issued.

* * * * *

Then follow general references to safety, proper handling and packing, proper maintenance, proper handling of reports, and cleanliness of equipment (R. 282). The rules then continue (R. 282–283):

7. Physical Examination.—The Company may require any driver to submit to a physical, or other examination at any time.

8. Attitute.—It is expected that at all times the attitude and conduct of the driver will be in the best interest of the Company. Any suggestions or complaints should be presented in writing or in person at the General Office where the matter will be given full consideration.

9. Union.—Truckman must be a member in good standing of the A. F. of L. Van Driver's Union Chicago Local #711.

10. Uniforms.—The company has adopted a uniform consisting of Greyvan Blue Uniform cap, jacket, trousers, or breeches, and Greyvan Gray uniform shirt, all to be worn with black necktie, belt and shoes or boots.

11. Cleanliness.—Truckmen and helpers must report at loading and unloading points cleanly shaven and with clean and neat clothing.

No truckman could come on duty "under the influence of even one drink of alcholic liquor or beverage, nor shall any truckman drink any alcoholic liquor or beverage while on duty, nor carry alcoholic liquor or beverage on his person. Intoxication while on duty will be cause for immediate dismissal" (R. 283).

"The mental attitude of the truckman, his freedom from unusual cares and worries," was considered "important in the satisfactory performance of his duties. For this reason the Company objects to truckmen having continual domestic troubles, outside business worries, attachment suits, garnishments, assignments of wages, and other personal difficulties when it appears that because of such troubles the truckman is not free to devote his entire attention to his duties". (R. 283.)

"No woman, whether wife, sweetheart, mother, sister, daughter, or 'hitch-hiker' is allowed on any van at any time" (R. 283).

"Truckmen and helpers must be diplomatic, courteous and tactful in dealing with shippers and others. The Company expects truckmen and helpers to be gentlemen at all times. Truckmen are not to smoke while in the shipper's home, nor inside of the van." (R. 283.) A subsequent elaboration of these general rules states that "Such terms as 'Dad,' 'Pop,' 'Pardner,' 'Lady,' 'Sister,' or 'Babe,' speaking of or to the shipper, will not be tolerated" (R. 315).

In connection with other aspects of the truckman's work the Manual provided:

Truckmen had to "patronize and be available only at parking lots designated by the Company. Each van shall purchase as much gas as possible at designated lots." (R. 284, 338.)

"Under no circumstances are Truckmen to take time off at home or elsewhere except on authority of the General Office." "On all trips the driver is to take the most practicable route between the two designated points except as otherwise dispatched." (R. 284.) "All drivers are forbidden to use or drive the vehicles of shippers or others for any purpose in connection with the Company's business" (R 284).

The interior of the cab was to be neat and orderly with no postcards, souvenir pennants,

etc., in the cab and any curtains in the windows were to be "plain blue or white" (R. 284). "Only authorized paint, color, design and lettering are to be used" (R. 285).

"Schedules for deadheading are as important as schedules when Truckman is handling a shipment. Should there be any delay en route, proper parties must be advised. * * * He should be sure to receive Instructions in sufficient time to make all necessary arrangements for proper help and loading." (R. 285.)

Section 2 of the Manual (R. 285–293), dealing with "Procedure," declares in its introductory statement (R. 285):

> The following pages outline the procedure to be followed from the time the truckman receives instructions to load (Instructions to Truckman) until he finishes his job and prepares for the next shipment. Truckman should be fully acquainted with every phase of this important work and should review these instructions from time to time to see that they are followed very carefully.

The section then describes in detail how every operation should be carried on.

The Manual contains a number of provisions with respect to helpers:

"No truckman may turn his van over to his helper or other person without specific authority from the General Office" (R. 283).

"Truckmen must see that all helpers abide by the rules contained herein" (R. 283).

Truckmen shall employ Union helpers "who are duly qualified to perform such services, whenever they are available, and shall pay his said helpers the prevailing rate of pay of Local Unions. Whenever any truckman is operating into or out of any location where a strike condition exists affecting his operation, he must first contact the proper representative of the Union" and "abide strictly" by his instructions (R. 283-284).

It was further provided that: (R. 309)

> Helpers may only be acquired in the following manner:
>
> 1. It must be understood that where possible only such men are to be used as have proper union a*ll*iliations [sic].
>
> 2. When reporting for loading or unloading in a city or vicinity of a city where we maintain an office, Approved Parking Lot Helpers only may be used if available. A list of these helpers will be mailed from time to time. Other helpers are not to be used if approved parking lot helpers are available.
>
> 3. When loading or unloading in a city or vicinity of a city where we maintain an office and no approved parking lot helpers are available, Truckmen must contact the local office for help which will be secured from a local warehouse or local union.
>
> 4. When unloading in a city maintain an agent, help must the agent if possible.

cured from agent should be made directly to the agent rather than to his men.

5. Where help cannot be secured from an agent or there is no agent or office at loading or unloading point, secure help only from a local mover or local union.

* * * * *

(R. 315.)

* * * Truckman must not take any helper on a job unless he is clean and neat. He is not to allow any helper to discuss his business with the shipper. The sole duty of a helper is to help get the furniture either from the van to the house, or from the house to the van. All other matters connected with the job are solely between the shipper and the Truckman. Helpers must not be allowed to enter into them.

The remainder of the manual includes rules as to bills of lading (R. 293); claims (R. 296); freight bills (R. 298); furniture loading and unloading (R. 302); inventory (R. 309); packing (R. 312); maintenance (R. 321); safety (R. 330); credit cards (R. 337). It concludes with a list of parking lots, offices and agents (R. 338–368). "Where Parking Lots are designated they are the only parking places which will be used in the respective cities." "If we have an office or agent in that city, report there before loading or unloading." (R. 338.)

Proceedings before the Interstate Commerce Commission.—Respondent obtained a certificate public convenience and necessity from the In-

terstate Commerce Commission for its operations. In those proceedings in April, 1939, it filed exceptions (R. 385–388) to an examiner's report (R. 385) which had recommended disallowance of the petition for the certificate (R. 381) for lack of supporting evidence. Respondent stated in its exceptions that (R. 387): "This 'driver-owner' equipment was operated under the full management and control of the company, and together with the owner was subject to all orders of the company's representatives and agents." In October, 1939, respondent's counsel in arguing these exceptions before the Commission stated that for "all intents and purposes * * * the employer-employee relationship" existed between respondent and the truckmen (R. 384). The Commission's report, accepting respondent's argument, stated (R. 393):

> That it was the intention of the parties that applicant assume all responsibility to the general public for the operation of the vehicles cannot be doubted. It is also clear that applicant's own employees directed the movement of the vehicles and caused the drivers thereof to comply with such company rules as would insure efficient operation. * * *
>
> * * * * *
>
> * * * The owner-operators, as indicated by the testimony provided by one in applicant's service continuously since prior to

June 1, 1935, looked to applicant's direct employees for instructions; they did not deal with the shipping public; they did not conduct motor-carrier operations on their own behalf; they did not hold themselves out to render services except for applicant and as directed by its employees; and they operated the equipment in continuous service for such trips and at such intervals as directed by applicant.

The taxes assessed.—Respondent did not file tax returns for the truckmen or their helpers. The Commissioner thereupon executed amended returns for respondent pursuant to I. R. C. sec. 3612 (R. 23).

In breaking down the payments to truckmen between wages and sums paid for use of equipment, the Commissioner used the Union wage scale in determining wages (R. 25–26). The total wages of the helpers, whose number and identity were unknown, were determined to be 41.67% of the wages paid the truckmen (R. 26). These determinations were based on a prior agreement between the Collector of Internal Revenue and respondent's treasurer in charge of the matter under which it was agreed that the allocation was "fair" and the figures used were "correct", although respondent's officer acknowledged no liability (R. 141). The assessments were made on the basis of the wages so allocated (R. 25–26).

The cases were consolidated and tried to the court without a jury. The district court held that

the truckmen were not employees but independent contractors (R. 222), and that the helpers were also not employees of respondent but employees of the truckmen (R. 226). It was further held that the determination of the amounts of taxable wages was arbitrary and illegal (R. 224). Judgment was entered for the respondent (R. 228–230). On appeal the circuit court of appeals affirmed (R. 259).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were employees of the respondent and that it was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship between the parties in holding and determining that the truckmen and their helpers were not employees of the respondent within the meaning of the Act.

3. The Circuit Court of Appeals erred in its application of the common law test of master and servant in determining that the control of the truckmen over the number and identity of the helpers used in their operations was conclusive proof that they were not employees of the respondent.

4. The Circuit Court of Appeals erred in holding that the Commissioner's assessments and de-

terminations of amounts of taxable wages of the truckmen and helpers were arbitrary.

SUMMARY OF ARGUMENT

I

It is our position that for the reasons set forth in the brief for the United States in *United States* v. *Silk*, No. 312, pp. 14–44, "employment" in the Social Security Act should be construed to reach persons on the periphery of the common law relationship who earn their living in the service of another's business and are subject to the hazards of unemployment. The men whose status is here involved fall within that class and should be given the benefits which the Act was intended to provide.

II

In any event, under any conventional concept of the term "employee", the persons in question were within the coverage of the Act. In tort cases courts emphasize the control factor under which a person is an employee if the employer has a right to control the means and manner of performing the services. The employment contract here, as in *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, required the truckmen to work exclusively for respondent, and explicitly bound them to "comply with all the rules and regulations and instructions of the Company" (R. 266). In fact the truckmen operated as an integral part

of respondent's business; they were subjected to the daily orders of respondent's dispatcher and could not pick up and load without his approval. The contracts were terminable at will. The "Manual for Truckmen" issued to the truckmen contained rules covering the details of all aspects of the men's work; it has not been suggested that respondent lacked the *right* to control the truckmen's conduct by such rules. Although the truckmen hired their own helpers they were in normal circumstances required to drive or remain personally on the trucks themselves, and were clearly not managers of an independent business enterprise. The truckmen were represented by a labor union in bargaining with respondent. Respondent itself characterized the truckmen as its employees in order to obtain from the Interstate Commerce Commission a certificate of necessity covering their operations. In view of these facts the truckmen's ownership of the vans and authority over helpers does not prevent them from being respondent's employees.

III

The determinations of the lower courts that the Collector's return and the tax assessed thereon were arbitrary and could not be sustained were clearly in error. A Collector's return based upon the best information available to him is prima facie correct. The burden of establishing its in-

correctness and the extent to which it is incorrect rests upon the respondent. Respondent introduced no evidence on the question. On the contrary, the respondent's treasurer conceded that the amounts were correct if there was any liability for a tax upon the remuneration paid to the persons in question. Thus the respondent's proof raised no issue upon which the courts could make a determination that the amount of the tax was arbitrary and erroneous.

ARGUMENT

I

THE TRUCKMEN AND THEIR HELPERS WERE EMPLOYEES OF THE RESPONDENT WITHIN THE INTENT AND PURPOSES OF THE SOCIAL SECURITY LAW

The principal questions here, like those posed in *United States v. Albert Silk*, No. 312, this Term, are: (1) what is the proper test to be applied in determining whether a person is an employee within the meaning of the Social Security Act, and the corresponding provisions of the Internal Revenue Code, and (2) how shall that test be applied to the facts of this case?

The sections whose meanings are in dispute define "employment" as "* * * any service, of whatever nature, performed * * * by an employee for his employer * * *." Sections 811 (b) and 907 (c), Social Security Act, Ap-

pendix, *infra*.[12] The respondent successfully contended in the courts below that the services performed by the truckmen were not services performed by employees for their employer because they were services performed by independent contractors.[13] (R. 227, 258.) Thus the crucial word is "employee"; and its meaning is the test by which the facts of the case must be measured.

As appears from the Government's brief in the *Silk* case, pp. 14, *et seq.*, the term "employee" is not a word of art with an exact meaning, and its Congressional meaning has varied with the circumstances under which it has been used. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 120–121; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 544–548. Where this Court has been required to determine its meaning without aid of a statutory definition, as is the case here, it has always looked to the objectives intended to be reached by the particular statute. Like the National Labor Relations Act and the Fair Labor Standards Act, the remedial purposes of the Social Security Act were directed towards that class of persons who earn their living

[12] Because of changes made in the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, beginning with 1940 the term "employment" included "any service, of whatever nature, performed * * * by an employee for the person employing him. * * *." Sections 1426 (b) and 1607 (c), Internal Revenue Code.

[13] The controversy with respect to the helpers is confined to whose employees they were. The District Court held they were employees of the truckmen, because the latter were independent contractors. (R. 227.)

in the regular course of another's business and who are subject to the hazards of unemployment, the social and economic effects of which the Act was intended to alleviate. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619. It was this class of persons which Congress had in mind when it used the term "employee". Cf. *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.), certiorari denied, 326 U. S. 720; *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4). The test we believe to be proper is set forth in the *Silk* brief and will not be repeated here.

If, as we believe, Congress intended the term "employee" to encompass persons in the borderland between the servant and the independent contractor whose living is earned performing services in the regular course of another's business, on the undisputed facts of the case the truckmen clearly would be employees of the respondent. From the record it is seen that the respondent is engaged in a nation-wide business of moving furniture—and certain other goods—in thirty-eight states and parts of Canada (R. 219). All business is done under its own name; the contracts are made in each instance, directly with the shipper for the carriage of his goods (R. 270). All equipment used in its service bears only its name and is painted its particular design and color. (R. 106, 158, 265.) Its charges are all based on tariffs

established and filed by it with the Interstate Commerce Commission (R. 139, 161–162). It operates only by virtue of a certificate of public convenience and necessity issued to it and it must observe such reasonable rules and regulations as may be established by the Interstate Commerce Commission for the protection of this public interest (R. 219). Part II, Interstate Commerce Act, c. 498, 48 Stat. 543, as amended by the Act of September 18, 1940, c. 722, 54 Stat. 919, Title I, Section 15; *Greyvan Lines, Inc., Common Carrier Application*, 32 M. C. C. 719. The respondent maintains a staff of salesmen and estimators and a system of dispatching the vans, and it is the duty of the dispatcher to select vehicles for all shipments and to direct their movements. (R. 135–136, 145, 225, 341–368.)

It is into this business that the respondent has fitted the services of the truckmen and helpers in question. The exclusive use of their trucks rested with the respondent, and they could do no hauling for any other person or carry any goods in their own name even though they developed the business. (R. 110, 265–266, 270.) They could not even haul for respondent without getting approval in advance of each shipment from respondent's dispatcher. No part of the business belonged to the truckmen. They were completely absorbed into the organization of the respondent, and, if they had any identity in this particular field before hiring themselves and their trucks to the

respondent, they lost it immediately upon entering its employ. Aside from the monetary compensation received for their services they gained nothing by their efforts. Since the respondent, rather than the truckmen, had the required certificates from the Interstate Commerce Commission and the States, there were substantial legal obstacles to the truckmen engaging in an independent business of their own apart from the respondent. All goodwill and other things of lasting business value inured to the respondent and if it saw fit to sever the relationship, as it could when it chose, the truckmen—even though they did not dispose of their trucks (R. 118)—in common parlance, were unemployed men looking for a job. The fact that the truckmen had a considerable investment in the vans and equipment, which in some circumstances might indicate their independence, is outweighed by the other factors to which we have referred.

If to these facts are added those summarized in Point III, *infra*, we submit that there can be no question as to the truckmen's status as employees.

II

THE TRUCKMEN AND THEIR HELPERS ARE "EMPLOYEES" OF THE RESPONDENT WITHIN ANY GENERALLY ACCEPTED MEANING OF THE TERM

As we have shown above the truckmen and their helpers are clearly employees within the intent and purposes of the Social Security laws. The

Singer Manufacturing Co. v. *Rahn,* 132 U. S. 18. See also: *Railroad Co.* v. *Hanning,* 15 Wall. ; *Casement* v. *Brown,* 148 U. S. 615. The basis in this test is upon the right to exercise ol rather than upon the control exercised in Cf. Treasury Regulations 90, Article 205, lix, *infra;* Restatement of Agency, Section

apart from the "Manual for Truck- facts outlined in the Statement, which epeat, demonstrate that the truckmen ent's employees under any test. The an integral part of respondent's e subject to the day-to-day orders dispatcher to whom their every be reported. Under the con- exclusively for respondent and spondent's rules, regulations e contracts were subject to without cause. The truck- load without obtaining re- l. All dealings with the 's name. Except where mission, the truckman the truck himself or . *Supra,* p. 5 (R. for "satisfactory" sonal appearance 73). The truck- a union affiliated with

the American Federation of Labor in bargaining and contracting with respondent; the union agreement specifically indicated (R. 369) that the truckmen were to be subject to the protection of the National Labor Relations Act, which, like the Social Security Act, applies only to "employees". If the truckmen had been independent entrepreneurs and not employees, such collective action on their part to fix rates might have violated the antitrust laws. Cf. *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143.

That respondent had no reluctance to characterize its relationship to the truckmen as one of employment appears from its argument to that effect (quoted *supra*, p. 22) before the Interstate Commerce Commission in support of its application for a certificate of convenience and necessity. At the time these statements were made they were directed towards establishing a vital element without which its application for grandfather rights might fail, for it was the Commission's position that "if the owner-drivers were independent contractors, applicant, of course, could not be a 'motor carrier' in respect of operations conducted by them".[14] *Interstate Dispatch*,

[14] It is immaterial for present purposes whether the dividing line between an independent contractor and an employee under the Motor Carrier Act is as a matter of law the same as that ordinarily applied at common law. Cf. *Thomson* v. *United States*, 321 U. S. 19. It is sufficient that respondent thought the test was the same when it sought to get a certificate from the Interstate Commerce Commission.

Inc., Common Carrier Application, 30 M. C. C. 763, 767; *Allied Van Lines, Inc., Common Carrier Application*, 46 M. C. C. 159, 190. See also *Acme Fast Freight v. United States*, 30 F. Supp. 968, 972 (S. D. N. Y.), affirmed *per curiam*, 309 U. S. 638; *Dixie Ohio Exp. Co., Common Carrier Application*, 17 M. C. C. 735. This was the test applied by the Commission in granting respondent's application. 32 M. C. C. 719, 723–724 (R. 393–394).[15]

[15] It is to be noted that in *Thomson v. United States*, 321 U. S. 19, the Court, in holding that a railroad which had made arrangements with truckmen similar to those here involved was entitled to a certificate, stated "The operators are 'independent' only by grace of contract nomenclature." 321 U. S. at 25. The Commission has since construed the *Thomson* decision as not inconsistent with the principle previously upheld by the Court in *Acme Fast Freight, Inc. v. United States*, 309 U. S. 638, affirming, *per curiam*, 30 F. Supp. 968, that "in order for one to be a common carrier by motor vehicle within the meaning of section 203 (a) (14) of the Interstate Commerce Act he must have direction and control of the motor vehicles which do the carrying for him while they are doing it, and must be responsible to both the shipper and the general public for such operation." *Railway Express Agency, Inc. Extension—Waggoner, Ill.*, 44 M. C. C. 1, 3. (In the *Acme* case the district court had indicated that the definition in the Motor Carrier Act reached only a carrier which "operates *in propria persona* or through its agents and not through independent contractors." (30 F. Supp. at 972)). Subsequently, in *Allied Van Lines, Inc. Common Carrier Application*, 46 M. C. C. 159, 190, 197 (1946), the Commission referred to its *Greyvan* decision as follows: "These vehicles were used exclusively in its service under a contract which subjected the vehicle and its owner to the control of the company. The owner was required personally to drive the vehicle unless Greyvan gave permission for the use of a substitute driver." The report further stated: "We

Furthermore, the respondent secured identification plates from the Interstate Commerce Commission and used them on the owner-driven trucks (R. 224), under regulations which provide that "an identification plate shall be displayed only upon motor vehicles operated by and under the control, supervision, and responsibility of the motor carrier to whom such plate be issued", Rules and Regulations Governing the Display of Identification Plates by Motor Carriers Subject to the Motor Carrier Act, 1935 (2 Fed. Register (1937), part 1, pp. 1066–1067).

The "Manual for Truckmen" is thus not essential to the Government's position. We think that the courts below clearly erred, however, in disregarding it, for two reasons. In the first place the undisputed evidence shows that in 1940 respondent gave the Manual to all truckmen (R. 141, 171). The opening section of the Manual stated without equivocation that (R. 281):

> Truckmen's duties are prescribed by the rules herein contained and such additional orders as may be hereafter issued by the

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believe that we have followed the principles of *Thomson* v. *United States*, *supra*, in the present case by applying a 'realistic test' rather than a formal test of 'contract nomenclature,' in deciding who are the parties engaged in transporting." In this state of the authorities, it appears that both before and since its decision on Greyvan's application, the Commission has construed the Motor Carrier Act as not permitting the issuance of a certificate where an applicant used independent contractors for performing its transportation service.

> General Office. If in doubt as to the meaning of any rule, the driver should immediately apply to the nearest office for explanation. Ignorance of the law or of any rule of the Company will not be accepted as an excuse.
>
> * * * This book contains the fundamental rules. When changes in the instructions outlined in this manual are necessary, they will be issued by the General Office to all drivers. The changes will be accompanied by instructions as to where they are to be placed in the manual.

Respondent's witness conceded that the truckmen were "never notified [that] they were not obliged to follow the Manual" (R. 171). With these facts undisputed, we think that respondent is in no position to assert that the Manual did not to a large extent actually control the conduct of its drivers in accordance with the detailed instructions contained therein—even though respondent thought the Manual impractical and as a matter of unannounced policy did not enforce it (R. 171), and even though some (R. 104) but not all (R. 185–186) truckmen may not have treated it as binding in all respects.

In the second place and more significantly—even if we assume *arguendo* that respondent is correct in the contention that the Manual is not to be taken as manifesting *actual* control—the Manual demonstrates that respondent had the *right of control* over the details of the truckmen's

work. For respondent has not suggested that the Manual was not a lawful exercise of its rights under the contract to issue "rules and regulations and instructions" (R. 266) with which the truckmen were obligated to comply. Indeed its counsel indicated the contrary (R. 182, quoted *supra*, pp. 4-5, n. 3). The crucial fact which this evidence establishes is the extent to which the employment relationship between the parties contemplated the right of the company to control the performance of the services; for the test is not how much control was exercised in fact but how much control did the company have the right to exercise. See authorities cited *supra*, p. 32. There is nothing in the record or the findings or the opinion below or in respondent's argument which questions the right of the company to prescribe such detailed instructions.[16]

If the Manual is pertinent on either of the above theories, it eliminates all question as to

[16] Besides clearly showing the extent to which the employment contract contemplated detailed control of the truckmen by the respondent, the "Manual for Truckmen" serves another valuable purpose. It gives to the Court in condensed form the clearest picture of the respondent's business, its mechanics and the nature of the problems which arise in its day to day operations. It shows a business which exalts details, in which the manner of performing the transportation service is as important as the transportation itself. One cannot read the Manual and thereafter suppose that it would be possible for the respondent to operate such a business in this manner without retaining the ultimate right to control the truckmen and their helpers in the performance of their services.

the scope of respondent's control or right to control the truckmen's activities in great detail. It is sufficient to say that the instructions issued to the truckmen in the "Manual" were so all-inclusive as to extend to such personal details as their mode of dress, their personal cleanliness, and even their domestic tranquility (R. 283). It is difficult to conceive of greater rights of control over the means and manner of performing services than to be able to require that they be performed in clothing of a particular combination of colors, with a clean shaven face and a carefree mind.

Respondent argues (Br. in Opp. p. 9) that because the drivers operate throughout the country detailed control by the company over their activities is impossible. This, of course, would be equally true as to drivers who do not own their trucks, whose employee status is unquestioned. Here there was as much control as the nature of the business permitted or required, and that is all that is necessary to establish an employment relationship. See *Silk* brief, pp. 49, 54.

In *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518, this Court found an employment relationship by reason of the rights reserved in the employment contract. The contract in that case was very similar to that shown here, except for the fact that the *Singer* case involved a horse and wagon instead of a truck. The reputed employee in the *Singer* case was a salesman getting

about by means of a horse and wagon selling sewing machines on the basis of a percentage of the price received by the company. The wagon was furnished by the company, but the horse and harness were his, to be used exclusively in canvassing for the sale of said machines and the general prosecution of said business." The salesman agreed "to give his exclusive time and best energies to said business, and to pay all expenses attending same"; he was to forfeit his commissions under the contract if, while it was in force, he sold any machines other than those furnished him by the company; and he agreed "to employ himself under the direction of the said Singer Manufacturing Company, and *under such rules and instructions as it or its manager at Minneapolis shall prescribe.*" The company could discharge him by terminating the contract at any time. *Singer Manufacturing Co.* v. *Rahn,* 132 U. S., at 519, 523.

When the contract here (R. 265–271) is compared we find all of those elements present, in addition to the fact that here the driver could not enter into a contract with a customer without first obtaining company approval. Here too the truckman was to "devote said motortruck or trucks exclusively to the services of the Company in its transportation of goods, wares, and merchandise * * *; and in connection therewith comply with all the rules and regulations and instructions of the Company."

In the *Singer* case it was pointed out by the Court (p. 523) that the right of control reserved by the contract was so broad as to make the salesman subject to any direction by the company, even including such details as the route to take or the speed to drive although no such directions were shown to have been given.

It can hardly be doubted that the same breadth of control which existed in the *Singer* case exists here, even if we confine ourselves to the terms of the contract and disregard the supporting evidence, summarized in the Statement, which clearly establishes that the parties contemplated that the truckmen and their helpers should be completely subservient to the wishes of the respondent. Although here no control was actually exercised over routes, there can be no doubt, in view of the contractual requirement that the drivers "comply with all * * * instructions of the Company" that respondent had authority to control the drivers in that respect if it wished to do so. Clearly it exercised its right of control over many more details of the work than the employer in the *Singer* case.

From the terms of the contract, the interpretation placed thereon by respondent's "Manual for Truckmen", the evidence of control exercised and the statements of respondent concerning its right of control, it is evident that the respondent had that direct and plenary right of control which characterizes the employer-employee relationship

at common law. *Singer Manufacturing Co.* v. *Rahn, supra.* To this may be added that indirect—though hardly less complete—right of control stemming from the respondent's right to discharge the truckmen without liability. Many courts have said,[17] where a man is performing personal services in the regular course of another's business, that such a right is substantially equivalent to the right to direct the details of performing the services. Such a right excludes that "liberty of action" (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 521) which typifies the independent contractor. See *Silk* brief, pp. 28–30, 50–51. The truckmen clearly were not the managers of an independent business enterprise. That they were primarily truck drivers, not entrepreneurs, is shown by respondent's requirement that in normal circumstances they must either drive or remain on the truck personally. *Supra,* p. 5.

As against the existence of all of the elements of the employment relationship heretofore described is the fact that the truckmen owned and maintained their trucks and hired their own helpers. Clearly these facts do not outweigh the factors to which we have referred. Nor do they as a matter of law negate the existence of employ-

[17] *Messmer* v. *Bell & Coggeshall Co.,* 133 Ky. 19; *Cockran* v. *Rice,* 26 S. Dak. 393; *Maltz* v. *Jackoway-Katz Cap Co.,* 336 Mo. 1000; *Irvan* v. *Bounds,* 205 Ark. 752; *Industrial Com.* v. *Bonfils,* 78 Colo. 306; *Burruss* v. *B. M. C. Logging Co.,* 38 N. M. 254.

ment. That ownership of a motor vehicle does not have any such effect appears from the cases cited in our *Silk* brief (pp. 53–54).

The court below thought the right of the truckmen to determine what helpers, if any, they would use was the "vital" factor (R. 258). That single factor, however, cannot be sufficient to overcome the weight of all the other facts shown by the record—particularly in the light of the detailed rules laid down in the Manual with respect to the hiring of helpers (R. 309). See pp. 19–21, *supra*. Indeed, the truckmen were required by the Manual to obtain help through respondent's agent where one was present and to pay the agent rather than the helpers (R. 309).

Respondent stresses the fact that neither it nor the Commissioner had information as to the precise amount of wages paid to truckmen or their helpers. This does not prove the absence of an employment relationship, but merely that respondent thought, we believe mistakenly, that it was not subject to the Social Security Act and made no effort to comply. As the "Instructions to Truckman" (Plaintiff's Exhibit B, opposite R. 275) shows, respondent required the truckmen to give the names of helpers, and it would not have been difficult to require a statement of the wages paid.

Once the rights of the company with respect to controlling the truckmen have been determined, the fact that the truckmen hired the helpers is not of great consequence. It has long been held by this Court that at common law the hiring and

paying of helpers used in the performance of the services does not make an employee an independent contractor. *Railroad Co.* v. *Hanning*, 15 Wall. 649. See also *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870 (C. C. A. 4); *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94 (C. C. A. 6), certiorari denied, 302 U. S. 698; *Birmingham* v. *Bartels*, 157 F. 2d 295 (C. C. A. 8), certiorari granted January 6, 1947, No. 731, this Term. And a person may be the employee of another though he is paid by a third party. *Jones* v. *Goodson*, 121 F. 2d 176, 179 (C. C. A. 10), and cases cited; cf. *Williams* v. *Terminal Co.*, 315 U. S. 386; see also *United States* v. *Vogue, Inc., supra; General Wayne Inn* v. *Rothensies*, 47 F. Supp. 391 (E. D. Pa); *Willard Sugar Co.* v. *Gentsch*, 59 F. Supp. 82 (N. D. Ohio).

We submit that upon the clear evidence of the company's right to control the truckmen and their helpers as to the means and manner of performing the services these persons properly should have been held to be employees of the respondent within the common law meaning of the term "employee".[18]

[18] Respondent implies that the Government's argument suggests that there is something wrongful or unlawful about its relationship with the truckmen. Obviously it is proper and lawful for respondent, for perfectly reasonable business considerations, to require its truckers to own their trucks. We contend only that such a device does not deprive the truckmen who perform work normally that of employees in substantially the way employees would perform it, of the protection the Social Security Act accords to employees.

III

THE TAX WAS NOT ILLEGAL AS BEING AN ARBITRARY SUM ARBITRARILY DETERMINED

The term wages is defined in Section 811 (a) of the Social Security Act (Appendix, *infra*) as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash". We have shown that the truckmen and their helpers were employees of the respondent and their services clearly were not performed gratuitously. Thus under the broad statutory definition, what these men received as compensation for their services (as distinct from payment for the trucks) was wages which should have been returned and upon which a tax should have been paid. The respondent having failed to make such a return or keep records of such wages, the Collector made up returns upon such information as was available and a tax was assessed. (R. 22–93, 226–227.) The trial court found that such action on the part of the Collector was arbitrary, and the appellate court agreed. (R. 226–227, 259.)

Since the taxpayer paid wages for employment it was its duty under the law to report such wages and pay the resulting tax. Sections 801, 802, and 804, Social Security Act, Appendix, *infra*. The taxpayer having failed to do so, the Collector was empowered to make up returns upon his own knowledge or from such information as he could

obtain through testimony or otherwise. Such returns are "prima facie good and sufficient for all legal purposes". Section 3612, Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 3612, Appendix, *infra*, pp. 52–53).

There is no principle of tax law better settled than that the burden of proof rests upon a taxpayer to establish that an assessment is erroneous. *Reinecke* v. *Spalding*, 280 U. S. 227, 232–233; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *United States* v. *Anderson*, 269 U. S. 422, 443. And this burden is not sustained except by establishing all the facts necessary to a correct determination of the tax. *Burnet* v. *Houston*, 283 U. S. 223, 227–228; *Reinecke* v. *Spalding*, *supra*; *United States* v. *Anderson*, *supra*.

Section 3612, as we have seen, contains a specific provision that the Commissioner's returns are to be prima facie sufficient. Many cases have held that this imposes upon the taxpayer the burden of introducing evidence indicating the incorrectness of the assessment. See *Paschal* v. *Blieden*, 127 F. 2d 398, 401 (C. C. A. 8), and cases therein cited, in which the court said, quoting from an earlier decision, "that the assessment of a tax by the revenue officers is presumptively correct, 'and their action stands as prima facie correct until this presumption, by countervailing proof, is met and overthrown by the party assessed' ". Here the respondent introduced no

evidence whatsoever to overcome the prima facie effect of the assessment.[19]

On the contrary, respondent's treasurer admitted that the Commissioner's figures were fair. Since there seems to be some dispute as to this (Br. in Opp., p. 16), we quote the entire colloquy on the point (R. 141):

> Q. Now, with reference to the computation of this Social Security tax, you were in charge of the negotiations with the representatives of the Collector's office concerning that matter, were you not?
>
> A. Yes, sir.
>
> Q. And did you agree to the computations by the Collectors as to the amounts that were determined by them?
>
> A. I agreed that the figures they have set out is a fair figure but acknowledged no liability for the company.
>
> Q. In other words you agreed that if the truckmen were employees, the figures that they used were correct?
>
> A. That is correct.

[19] Although respondent's position as to the arbitrary nature of the amount of the assessment is not clear, it seems that their brief in opposition suggests at one point (pp. 16–17) that the assessment was arbitrary only because the persons in question were not employees, which assumes the point at issue in the case on the merits. The brief in opposition there states "we introduced no evidence as to the correctness or incorrectness of the computations but content ourselves on the proposition that there was no wage paid, and there is no tax payable because the truckmen were not employees within the meaning of the Social Security Act."

Q. So that there is no controversy about the amount of the wages mentioned by the collector?

A. No, sir.

Mr. BENOY. Well, I will object to that. You can't very well make a wage where none existed.

The COURT. I will draw the conclusion whether it is a wage or not.

It is true that the effort made by the Collector—for the respondent has presented nothing—was based upon his best approximation of the amounts of compensation which should be allocated to wages and included his best estimate of the amounts paid to helpers. The assessment for the drivers at the union wage scale for employed drivers (R. 25) was not unreasonable in the absence of other evidence; it probably was too low, but respondent is not complaining of that. The basis for the assessment for the helpers does not appear, although in view of respondent's treasurer's acceptance of it it could not have been unreasonable, even though it might have been imprecise. The exact basis for computing taxes is often impossible to determine and reasonable computations and approximations are acceptable. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 190; *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, 655; *United States* v. *Ludey*, 274 U. S. 295, 302. If the respondent had felt the approximation was at fault he was at full liberty to offer his figures and to establish such facts as would sup-

port their reasonableness. This the respondent has not done, but instead has conceded that the amounts determined were "fair" and that if the truckmen were employees the figures used were "correct." (R. 141.)

Since the respondent's proof has made no issue of the amounts involved and, if it is an issue, has advanced no evidence to show the correct amount of the liability, the courts below were in error in determining the assessments were arbitrary and, presumably, erroneous and illegal. *Burnet* v. *Houston, supra; Reinecke* v. *Spalding, supra; Wickwire* v. *Reinecke, supra; United States* v. *Anderson, supra.*

CONCLUSION

The decision below was in error and should be reversed.

Respectfully submitted.

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FEBRUARY 1947.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum.

(2) With respect to employment during the calendar years 1940, 1941, and 1942, the rate shall be 1½ per centum.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ,

equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

* * * * *

(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include that part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year.

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * *

(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * *

(42 U. S. C. 1940 ed., Sec. 1107.)

Similar provisions appear in Sections 1400 (1) and (2), 1401 (a) and (b), 1410 (1) and (2), 1426 (a), (b), and (f), 1600 and 1607 of the Internal Revenue Code.

Internal Revenue Code (26 U. S. C.)

§ 3612. Returns executed by Commissioner or collector—(a) Authority of collector.—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

(b) Authority of Commissioner.—In any such case the Commissioner may, from his own knowledge and from such information

as he can obtain through testimony or otherwise—

(1) To make return.—Make a return, or

(2) To amend collector's return.—Amend any return made by a collector or deputy collector.

(c) Legal status of returns.—Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

The words "employ", "employer", and "employee", as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, com-

mittee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two indi-

viduals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

An officer of a corporation is an employee of the corporation, but a director, as such, is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

* * * * * *

ART. 207. *Wages.*—The term "wages" means all remuneration for employment, whether payable in money or something other than money. The name by which such remuneration is designated is immaterial. Thus, salaries, commissions on sales or on insurance premiums, fees, and bonuses are wages within the meaning of the Act if payable by an employer to his employee as compensation for services not excepted by the Act. The basis upon which the remuneration is payable, the amount of re-

muneration, and the time of payment, are immaterial in determining whether the remuneration constitutes "wages." Thus, it may be payable on the basis of piecework, or a percentage of profits; and it may be payable hourly, daily, weekly, monthly, or annually.

The medium in which the remuneration is payable is also immaterial. It may be payable in cash or in something other than cash, such as goods, lodging, food, and clothing.

* * * * *

Sections 402.204 and 402.227, Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act, Sections 403.204 and 403.227, Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act and Articles 3 and 14, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, are substantially the same as the above sections.

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